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SUPREME COURT OF THE UNITED STATES

WARREN PULLIAM,
Petitioner,

versus

OHIO CASUALTY INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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59 pp

QUESTIONS PRESENTED

1. Whether indemnitee is required to make a formal tender of the defense to his indemnitor, or secure his approval of the settlement, before settling the underlying case, in order to hold his indemnitor liable thereon; such a rule is upheld by the Sixth Circuit, but denied by the Fourth Circuit.

2. Whether an indemnitee must make "a formal tender of the defense" to the potential indemnitor in order to hold him liable on a judgment rendered in an action to which he was not a party; and if so, whether this defect is jurisdictional in nature and renders the resulting Judgment void.

3. Whether the indemnitee's failure to provide the potential indemnitor with notice of an action on which he seeks to hold the indemnitor liable, so impairs the indemnitor's rights as to discharge the indemnity contract.

4. Whether the judgment in the underlying action was obtained by fraud, and if so, whether this was fraud on the court.

5. Whether Ohio Casualty's failure to assert the defenses available to it in the underlying action releases the Defendant from liability on the indemnity contract sought to be enforced.

6. Whether an indemnity contract is properly assignable under Kentucky law.

7. Whether the Complaint in this action states a claim upon which relief may be granted.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1999
No. _____

Warren L. Pulliam, Petitioner
v.
Ohio Casualty Insurance Co., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Warren L. Pulliam, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 23, 1999.

OPINION BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix B) was entered on June 23, 1999.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254.

PARTIES

Warren L. Pulliam, Petitioner.

Ohio Casualty Insurance Company, Respondent

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STATUTE INVOLVED

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STATEMENT OF THE CASE

This action arises out of a Complaint filed on May 25, 1990 by the Ohio Casualty Insurance Company (hereafter "Ohio Casualty") against Warren Pulliam (hereafter "the defendant" or "Pulliam"). That Complaint sought to hold the defendant liable on a supposed contract of indemnity executed by Pulliam in favor of the Peoples State Bank of Chaplin, Kentucky (hereafter "Peoples Bank"). The Complaint alleged that Peoples Bank assigned its rights under the indemnity contract to Ohio Casualty.

Ohio Casualty further alleged that, pursuant to a banker's blanket bond, it had paid $200,000 to settle a lawsuit styled *Barnett Bank of Tampa, N.A. v. Peoples State Bank of Chaplin, Kentucky*, Action No. 88-CI-00812, Jefferson Circuit Court (hereafter referred to as "the underlying case").

The events which form the basis of these actions occurred in the fall of 1986. During that time, Defendant Pulliam was President of Peoples Bank. The Pulliam family had owned a majority of the stock of the People's Bank since the 1950's.

In the spring of 1986 Donald R. Tibbitts (hereafter "Tibbitts") and Ben Mirizian (hereafter "Mirizian"), agents of the Prudential Insurance Company of America and of Prudential-Bache Securities, Inc. (hereafter collectively referred to as "Prudential"), appeared in the Chaplin area promoting a number of investment schemes. During the ensuing ten months, they sold over $1,600,000 of fraudulent securities in the Chaplin area.

During the course of these activities, both Tibbitts and Mirizian opened business accounts at the Peoples Bank. On April 4, 1986, Tibbitts invested $400,000 of Peoples Bank's funds in Prudential securities. On April 7, 1986, Tibbitts assigned $40,000 to Peoples Bank as a guarantee that this investment would yield a return of 10%. Prudential either knew or should have known that Tibbitts had made these representations on its behalf. In November, 1986, Pulliam issued certified checks in excess of $800,000 for Tibbitts. These checks were covered by funds transmitted to Peoples

Bank from Barnett Bank of Tampa, N.A. (hereafter "Barnett Bank"). These funds were secured by an irrevocable letter of credit issued by Prudential to Barnett Bank, and by 1,000,000 shares of common stock in Video Communications Inc.

On December 3, 1986, Tibbitts deposited to the account of Peoples Bank at Liberty National Bank of Louisville, a check drawn on Douglas A. Murdock (hereafter "Murdock") at Barnett Bank in the amount of $460,000. On December 3, Tibbitts deposited to the same account a check drawn on Tibbitts' account at BankOne of Lexington in the amount $275,000. Both of these checks were dishonored by the drawee banks for insufficient funds. On December 14, 1986, Pulliam demanded that Tibbitts furnish security to cover the certified checks. Tibbitts thereupon caused Murdock to tender to Pulliam 1,000,000 shares of common stock in Video Communications Inc. as collateral for Peoples Bank. This stock was assigned to Peoples Bank by the United States Mortgage and Trust Company, Inc., owners of said stock. This stock was worth more than $3 per share on that date. On December 16, 1986, Barnett Bank wire-transferred $100,000 to Peoples Bank despite its knowledge that problems existed on December 3, 1986, because Barnett Bank had dishonored the prior check of its customer Murdock, in the amount of $460,000. On December 18, 1986, after Barnett Bank knew that Pulliam had been dismissed as president of Peoples Bank because of these transactions, it nevertheless wire-transferred an additional $75,000 to Peoples Bank. On December 19, 1986, Barnett Bank wire-transferred a further $261,000 to Peoples Bank.

Upon learning of the alleged shortfall on December 16, 1986, James O. King (hereafter "King") persuaded Pulliam to meet with King and his attorneys James Straus and Charles Pritchett (hereafter "Straus" and "Pritchett") within the next twenty-four hours. This meeting took place on December 16, 1986, at 5:00 p.m. at the law offices of Brown, Todd & Heyburn, P.L.L.C. in Louisville, Kentucky. King instructed Pulliam to bring with him all of his shares of stock in Nelson Bancorp, Inc., which owned Peoples Bank; this constituted 50% of the total number of shares of Nelson Bancorp, Inc. King, Straus and Pritchett met with Pulliam and persuaded him to execute a restitution agreement, to surrender his certificates of stock in Nelson Bancorp, Inc. to King, and to tender to King an option to purchase this stock for less than its actual value.

Straus and Pritchett coerced Pulliam, who was without counsel, to sign the restitution agreement by which he covenanted to indemnify Peoples Bank for any losses it might sustain because of the certified checks which Pulliam had issued. Straus and Pritchett persuaded Pulliam to sign the restitution agreement which they had already prepared, while Pulliam was without counsel, by purporting to be his counsel, as shown by King's sworn testimony at trial.

In February, 1988, Barnett Bank filed suit against Peoples Bank in Jefferson Circuit Court in Louisville, seeking to recover funds which it claimed it had wrongly paid to Peoples Bank. Peoples Bank removed the action to federal court on the basis of diversity jurisdiction. Shortly thereafter, and for no apparent reason, counsel for Peoples Bank withdrew its removal petition and returned the action to Jefferson Circuit Court.

Peoples Bank also sought the discovery of Barnett Bank's business records. Barnett Bank resisted discovery and eventually transmitted the records to Jefferson Circuit Court under seal. Barnett Bank, in the meantime, had attempted to obtain discovery of Peoples Bank's business records. Peoples Bank, likewise, resisted discovery and transmitted the records to the court under seal.

Before the court could rule on these discovery requests, Peoples Bank and Barnett Bank entered an agreed order of dismissal in Jefferson Circuit Court. The terms of that settlement agreement were not disclosed to Pulliam or to the trial court. The instant Complaint states that a copy of the settlement agreement "is attached hereto". However, no such copy was ever filed in the Record.

Before agreeing to this settlement, **Ohio Casualty did not obtain Pulliam's consent to the terms, nor did it tender to him the defense of the case. Moreover, the terms of the settlement agreement are nowhere set out in the Record, nor is a copy of that instrument attached to the Complaint.**

Ohio Casualty thereafter filed this action against Pulliam. In its Complaint, Ohio Casualty alleged that it had paid $225,563.82 to Barnett Bank pursuant to the agreed settlement.

In July, 1992, after a two-day trial, the jury returned a verdict in the amount of $200,000.00 against Pulliam. Thereafter, on October 17, 1995, Pulliam moved the court to set aside that Judgement pursuant to CR 60 (b).

On October 2, 1996, the court denied Defendant's motion.

(Appendix C). The Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit. That Appeal was denied by Order dated June 23, 1999. The Petitioner filed a timely Petition for Rehearing *en banc*, which was denied. (Appendix B). He then filed this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SPLIT ON AN IMPORTANT QUESTION OF LAW.

A well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that by another federal court. ROBERT L. STERN AND EUGENE GRESSMAN, SUPREME COURT PRACTICE § 4.3 (5th ed. 1978). This is especially true when the decision in question conflicts with that circuit's prior decisions, and there is also a split among the circuits. *Id.*, at § 4.6, *citing Scarborough v. United States*, 431 U.S. 563, 567 n. 4 (1977).

A grant of certiorari is also appropriate when the circuit court has declined to convene an *en banc* hearing to resolve the intracircuit conflict. *Green v. Santa Fe Industries, Inc.*, 533 F.2d 1309, 1310 (2d. Cir. 1976)(denying a rehearing *en banc*), *rev'd*, 430 U.S. 462 (1977).

Certiorari is also appropriate where the challenged decision represents a gross miscarriage of justice, *Thompson v. City of Louisville*, 362 U.S. 199, 202-03 (1960), where "the decision below was unjust, unreasonable, or plainly wrong," McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 13 (1949), or where the result reached below is unduly harsh in its impact. *Montana v. Kennedy*, 366 U.S. 308, 309 (1961).

All of these factors are present in the case *sub judice*. As shown below, the result reached in this case is in direct conflict with the Sixth Circuit's prior holding *Tankrederiet Geifon A/S v. Hyman-Michaels Co.*, 406 F.2d 1039 (6th Cir. 1969). The Petitioner sought an *en banc* hearing to resolve this intracircuit conflict, but was denied. Moreover, there is a clear conflict between the circuits on the question involved; *cf., Tankrederiet Geifon A/S* (indemnitee required to make formal tender of defense to indemnitor) *with Burke v. Ripp*, 619 F.2d

354, 358-60 (5th Cir. 1980) and *CSAV v. I.T.O.*, 940 F. Supp. 855, 869 (D. Md. 1996)(formal tender of defense not required).

Furthermore, as is demonstrated hereinbelow, there has been a gross miscarriage of justice. More than a decade after the underlying events transpired, Ohio Casualty's campaign to destroy Warren Pulliam continues unabated. The Respondent seeks to recover from him two hundred thousand dollars which it paid as a volunteer when it had no legal obligation to do so, because it failed to adequately research the law.

Also, Ohio Casualty, its insured, Peoples Bank, and Barnett Bank, the supposed creditor, were holding collateral worth more than six million dollars to cover the supposed loss. For reasons known only to themselves, the parties chose to disregard this collateral and force Warren Pulliam to personally bear the cost of their own mistakes. The results have been disastrous for Warren Pulliam and for his family.

It is long past time that this vendetta came to an end, and that Warren Pulliam is belatedly given the day in court which Ohio Casualty has thus far denied him.

II. THE UNDERLYING JUDGMENT WAS OBTAINED BY FRAUD AND COLLUSION.

The District Court's judgment, holding Pulliam liable to Ohio Casualty in the amount of $200,000.00, should have been set aside. The underlying judgment was obtained by the fraud and collusion of Ohio Casualty, Peoples Bank and Barnett Bank.

It is well-recognized that a judgment obtained by fraud is void and may be set aside. This rule applies with full force to collusive judgments on which an indemnitor is sought to be held liable. As the treatise Corpus Juris Secundum explains: ". . . the indemnitor may always avoid the conclusiveness of a judgment rendered against the indemnitee by showing that it was the result of collusion or fraud." 42 C.J.S. *Indemnity* § 56 (a) at n. 35 (1991).

In this regard the attention of the court is respectfully directed to the holding of *Michaels v. Post,* 88 U.S. (21 Wall.) 398, 22 L.Ed. 520 (1874):

> . . . the rule (is) that whenever a judgment or decree is

> procured through the fraud of either of the parties, **or by the collusion of both**, for the purpose of defrauding some third person, such third person may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment was obtained.

Micaels v. Post, supra, 88 U.S. at 427, 22 L.Ed. at 526. *see, Welch v. Mandeville,* 14 U.S. (1 Wheat.) 233, 236, 4 L.Ed. 79 (1816)(per Story, J.)(judgment bars a subsequent suit "only when it is bona fide, and **not for the purpose of defeating the rights of third persons**"); *New Orleans v. Gaines,* 138 U.S. 595, 607, 11 S.Ct. 428, 34 L.Ed. 1102, 1106 (1890)(judgment not res judicata "if any fraud could have been shown and proved in the entry of the judgments").

The Sixth Circuit, construing Kentucky law, wrote that a judgment against an indemnitee is conclusive against the indemnitor, but that it might be avoided **"if the (indemnitor) could show that the (indemnitee) had not made a defense in good faith."** *City of Owensboro v. Westinghouse, Church, Kerr & Co.,* 165 F. 385, 388 (6th Cir. 1908); *see, City of Louisville v. Davis,* 157 Ky. 189, 191 (1914)(a judgment secured against indemnitee binds indemnitor **if the indemnitee has "diligently prepared and skillfully presented all the defenses that [indemnitor] could have made had he been a party to the suit"**); *Feland v. Berry,* 130 Ky. 328 (1908)(judgment rendered against indemnitee binds indemnitor since indemnitee "employed counsel and made a reasonably efficient and skillful defense in the suit").

Pulliam's indemnitees, the People's Bank and Ohio Casualty, failed to assert a number of affirmative defenses, cross-claims and counter- claims which were available to them. Since they also failed to offer Pulliam the defense of the underlying case, they effectively deprived him of the opportunity to assert those defenses.

(1) As Pulliam showed in the Court below, the underlying action was improperly venued; however, Peoples Bank and Ohio Casualty did not assert this affirmative defense.

(2) Peoples Bank and Ohio Casualty failed to assert a counterclaim against Barnett Bank for contributory negligence. Since this defense was clearly available to Peoples Bank and Ohio Casualty, their failure to assert it was either **gross negligence or clear fraud**.

(3) As noted below, when Barnett Bank filed the underlying

Complaint, Peoples Bank immediately removed the case to federal court. A short time later, however, Peoples Bank suddenly and unaccountably withdrew its removal petition, and returned the action to Jefferson Circuit Court. Pulliam should not be bound by Peoples' decision to litigate in state court rather than in federal court.

(4) Peoples Bank sought discovery of certain records from Barnett Bank. Barnett Bank resisted this discovery, and sent the records to the court under seal. Simultaneously, Barnett Bank sought discovery of certain business records from Peoples Bank. Peoples Bank, likewise, resisted discovery, and sent the requested records to the court under seal.

(5) Counsel for the respective parties entered at least three (3) separate agreed orders to insure that all of this information remained "non-public" and stated at least nineteen (19) times that this information would be "kept under seal."

(6) These protective orders grant to the said counsel the absolute and unrestricted right to "excise" from any document the name of every individual whose identity he did not consider "material and relevant to this action." Any of the said counsel could make such excisions and deletions at his sole discretion, without receiving the prior approval of the court, and without subsequently advising the court that they had done so.

(7) These protective orders provide that after the termination of litigation "all such confidential information shall be delivered or returned to the disclosing party or shall be destroyed." **None of this "confidential information" was ever divulged to Pulliam, although Peoples Bank and Ohio Casualty well knew that they intended to hold him liable on the resulting judgment.**

(8) Peoples Bank's counsel, Charles M. Pritchett, Jr., stated in his Memorandum in Support of Motion to Compel Production of Documents, that Barnett Bank's counsel had offered to show him a settlement agreement reached between Barnett Bank and Prudential **"on the condition that the undersigned counsel not divulge its contents to his client, or any other party,"** (emphasis in original). Attorney Pritchett advised the court and counsel that he regarded this as **an invitation to "breach his ethical obligations owed to the client."** Pulliam was never advised that any unethical conduct had occurred.

(9) In its Release and Assignment, Peoples assigned to Ohio

Casualty all of its "rights, claims, causes of action, and/or rights to causes of action for recoupment of Peoples loss against...Joe Hacia, Prudential-Bache Securities, Inc. and the Prudential Insurance Company of America". Peoples and Ohio Casualty also agreed "that Ohio, with Peoples' cooperation will obtain judgments, settlements or compromises of **any and all** such causes of action which are herein assigned to it by Peoples, and **any and all** causes of action to which Ohio is entitled by equitable subrogation". Despite this agreement, **Peoples and Ohio Casualty did not file a third-party claim against Joe Hacia, Prudential-Bache Securities, Inc. or the Prudential Insurance Company of America**.

(10) Peoples and Ohio Casualty also agreed that "Ohio will submit to Peoples any purposed settlements and/or compromises;" however, **neither Peoples nor Ohio Casualty submitted the purposed settlement agreement to Pulliam, their indemnitor, for his approval**.

(11) Peoples and Ohio Casualty agreed, in the Release and Assignment, that Peoples "will fully cooperate in all recovery efforts undertaken by Ohio, by making such information, records, documents, reports and/or personnel available to Ohio as Ohio in their sole discretion or the discretion of their counsel may deem necessary or advisable;" **but this information was not made available to Pulliam, their indemnitor**.

Neither Peoples Bank nor Ohio Casualty asserted any of these eleven (11) defenses, which they concede were available to them. Instead, the parties dismissed the action based on a settlement agreement between Peoples, Ohio Casualty and Barnett Bank. **The terms of this settlement agreement were never disclosed either to the court below, to Jefferson Circuit Court, or to Pulliam, the party sought to be held liable thereon**. The sealed envelopes containing the discovery material submitted by both sides remain in the case file, unopened.

The Record in the underlying case, therefore, reveals at least eleven (11) circumstances from which fraud and collusion can be implied. These circumstances, taken together, required the court below to set aside its prior judgment on the grounds that the Jefferson Circuit Court judgment was obtained through fraud and collusion. At the very least, Pulliam should have been allowed to take discovery on the question.

Pulliam, as an indemnitor, has been asked to pay a judgment in the amount of $200,000. The effects of that judgment have been, and will continue to be, ruinous for Pulliam and his family. Pulliam has never seen the sealed discovery material which reposes in the files of Jefferson Circuit Court. It is at least possible, if not probable, that if given access to those records, Pulliam could show that Peoples Bank and Ohio Casualty had a good defense to the underlying action and that the settlement agreement resulted from fraud and collusion. He should, at the very least, have been allowed this discovery.

Pulliam concedes that at this time he can offer no direct proof of the parties' collusion. Collusion and conspiracy, however, must usually be shown by circumstantial evidence. As the Third Circuit has noted:

> (I)n this modern era of increasing subtleties, it **is rare indeed for a conspiracy to be proved by direct evidence**. There is no dispute over the proposition that circumstantial evidence will sustain a finding of conspiracy.

Milgram v. Loew's, Inc., 192 F.2d 579, 583 (3d Cir. 1951).

The Sixth Circuit follows the same rule:

> The Union contends that there was no direct evidence that it conspired with large coal companies, or with anyone, for the purpose of putting anyone out of business...But it is recognized that **conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed.**

Pennington v. United Mine Workers of America, 325 F.2d 804 (6th Cir. 1963); *Allen v. United States*, 4 F.2d 688, 691 (7th Cir. 1924)("A conspiracy may be established by circumstantial evidence or by deduction from facts.").

Even earlier, the same court had stated:

> While, perhaps, there is no proof in this record of any preliminary meeting of these plaintiffs in error, or of a definite plan or agreement entered into by them to injure plaintiff in his person or property or deprive him of his lawful rights as an American citizen, yet **such proof is not essential to the establishing of a conspiracy, and indeed would be wholly impossible in the great majority of cases** of this character, for the evident reason that conspirators do not, as a rule, invite the public into their confidence, or advise the contemplated victim or victims in reference to such preliminary matters. **It is sufficient if the proof shows such a concert of action in the commission of the unlawful act,** or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention, and purpose of the alleged conspirators to commit the same.

Calcutt v. Gerig, 271 F. 220, 27 A.L.R. 543, 546 (6th Cir. 1921).

Stated another way, most conspirators do not make "Watergate" tapes of their conspiratorial activities; therefore, conspiracies must usually be proved by circumstantial evidence. The facts set out above clearly show that the People's Bank, Ohio Casualty and Barnett Bank settled the underlying case, to the detriment of Pulliam, and it may reasonably be inferred that they colluded to deprive Pulliam of his right to defend that action. Pulliam is entitled to have that judgment set aside for fraud and collusion.

In its Responsive Memorandum in the trial court, Ohio Casualty did not seriously contend that these defenses were not available in the underlying action. It contended, however, and the district court held, that any claim of fraud and collusion is now barred by the one-year statute of limitations (Order at 4-5). Although the trial court noted that the statutory bar does not apply to allegations of fraud on the court, he stated that allegations of collusion do not rise to the level of such extrinsic fraud.

The court below and Ohio Casualty have misread the law on this point. This is exactly the type of fraud which Pulliam has alleged, and which is shown on the face of the Record. It is well

established that collusion by counsel to deprive a party of his day in court, constitutes "fraud on the court." *In re Tri-Cran, Inc.*, 98 B.R. 609, 616-17 (Bkrtcy. D. Mass. 1989), *citing, Bizzell v. Hemingway*, 548 F.2d 505, 507-08 (4th Cir. 1977). [1]

The Sixth Circuit has stated that **"fraud on the court . . . consist[s] of conduct . . . that . . . is concealment when one is under a duty to disclose"** *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993). The rule that an attorney who corruptly sells out his client's interests is guilty of fraud on the court, is fully applicable to the case at bar. As shown below, an indemnitee is the agent of the indemnitor to prosecute the underlying action. *Bridgeford v. Burbank, infra.* **The attorneys representing Peoples and Ohio Casualty in the underlying action were, therefore, bound to diligently represent and zealously protect the interest of their indemnitor, Warren Pulliam.** They were, in legal contemplation, Pulliam's representatives. By bargaining away his rights without asserting the defenses which were available to Pulliam, and without securing his permission to do so, they breached their duty to Pulliam.

The court's attention is also directed to *United States v. Standard Oil Company of California*, 73 F.R.D. 612 (N.D. Cal. 1977), which held that a defendant demonstrated "fraud on the court" if he shows an unconscionable scheme or plan by third parties of which the plaintiff was aware or in which it participated, designed with intent to deceive or improperly influence the court by

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1. Other cases holding that a collusive settlement constitutes "fraud on the court" include *Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980); *Hadden v. Rumsey Products*, 96 F.Supp. 988 (W.D.N.Y. 1951) *reversed on other grounds* 196 F.2d 92 (2nd Cir. 1952); and *In re Estate of West*, 415 N.W.2d 769 (Neb. 1987)("equitable relief from a judgment exists where an attorney fraudulently pretended to represent a party but actually connived at his defeat, or, being regularly employed, corruptly sold out his client's interest"); *see Kimes v. Stone*, 84 F.3d 1121, 1127 n.3 (9th Cir. 1996)("examples of extrinsic fraud include purposely keeping a party in ignorance of the suit") *citing, In re Marriage of Stevenot*, 202 Cal.Rptr. 116, 129 (Cal. App. 1 Dist. 1984)("**failure to give notice of the action to the other party" is extrinsic fraud**); *see also, United States v. Throckmorton*, 98 U.S. 61, 65-66, 25 L.Ed. 93, 95 (1878)(finding extrinsic fraud "where defendant never had knowledge of the suit, being kept in ignorance by the acts of plaintiff"); *Hahn v. Hart*, 51 Ky. 426 (1851); 3 A.C. Freeman, A Treatise of the Law of Judgment, etc., (5th ed.) § 1231 at nn. 16-18 (1925).

suppression of documents material to its defense, with the result that it was prevented from fully and fairly presenting its defense.

This is precisely the showing that Pulliam has made in this case. He has shown an unconscionable scheme or plan by third parties, namely Peoples Bank and Barnett Bank, of which the instant Plaintiff, Ohio Casualty, was aware or in which it participated, which was designed to deceive the court by suppressing documents, namely the various settlement agreements and the discovery contained in the sealed envelopes, which were material to Pulliam's defense, with the result that he was prevented from fully and fairly presenting his defense.

Pulliam, therefore, has properly alleged fraud on the court and this court must so hold.

III. AN ERRONEOUS JUDGMENT MAY BE SET ASIDE.

A motion for relief from a judgment under Rule 60 (b) is generally addressed to the discretion of the court. There are, however, some situations so extreme that the result is foreordained and it would be an abuse of discretion to deny relief. *See, Pittston v. Reeves,* 263 F.2d 328 (7th Cir. 1959)(failure to notify all parties prior to voluntary dismissal mandates vacating judgment).

In exercising its discretion, **the court should incline toward granting rather than denying relief.** As the United States District Court for the Southern District of New York has explained:

> (A)ny doubt as to whether, in the court's discretion, the motion should be granted, is resolved in the movant's favor.

U.S. v. Small, 24 F.R.D. 429, 430 (S.D.N.Y. 1959).

As shown below, the instant Judgment is void for lack of subject matter jurisdiction. Wright & Miller note that a motion on this grounds:

> . . . differs markedly from motions under the other clauses of Rule 60 (b). **There is no question of discretion on the part of the court when a motion is under Rule 60 (b)(4).** Nor is there any requirement...that the moving party show

> that he has a meritorious defense. **Either a judgment is void or it is valid.** Determining which it is may well present a difficult question, but when that question is resolved, the court **must** act accordingly.

Wright & Miller, Federal Practice and Procedure: Civil 2862 (1973)(emphasis added).

The instant judgment is also invalid because it was obtained by the fraud and collusion of Peoples Bank, Barnett Bank, and Ohio Casualty. As demonstrated above, these three entities successfully conspired to ignore the rules of law, circumvent due process, and deny Pulliam his day in court. Rule 60 (b) is addressed to such situations.

As the Eighth Circuit has noted:

> Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case. The burden of proving such fraud and misrepresentation is, of course, upon the applicant and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence. It must also be made to appear where the application is made by a defendant that he has a meritorious defense to the action. If, however, there are adequate allegations of a meritorious defense properly verified, no counter-showing will be received to refute the allegations of merits presented by the moving party.

Assman v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947).

Since the petitioner can show that he had a number of meritorious defenses to the underlying action which the plaintiffs fraudulently prevented him from asserting, the court is without discretion and must grant his motion.

While a Rule 60 (b) motion based on fraud must ordinarily be brought within one year after the judgment is rendered, this limitation does not apply to cases where a fraud on the court is alleged. *Lockwood v. Bowles,* 46 F.R.D. 625 (D.D.C. 1969) Allegations of collusion, such as those asserted by the movant, state a claim for fraud upon the court, thus avoiding the statutory bar. *In*

re. Tri-Cran, Inc., 98 B.R. 609 (Bkrtcy D. Mass. 1989) The motion concerning fraud, therefore, is not untimely, even though it has been more than one year since the judgment in question was rendered.

Under Rule 60 (b)(6), **a judgment may be set aside when the blunders of a party's counsel have resulted in an obvious injustice.** Wright & Miller, Fed. Prac. & Proc.: Civil sec. 2864 at 222-23 (1973) For example, one federal court granted relief under this Rule because a party's **counsel was unfamiliar with the applicable area of law, and the defendant had a meritorious defense which his counsel had failed to assert.** *Escobar v. Shearson Lehman Hutton, Inc.*, 762 F.Supp. 461 (D.P.R. 1991).

The *Escobar* court commented that **Rule 60 (b)(6) relief is available "if the moving party has a claim or defense of substantial merit that can be asserted if the judgment is set aside."** *Escobar, supra,* 762 F.Supp. at 462 citing Hazard & James, Civil Procedure §12.14 at 676.

This court has applied this Rule to vacate an agreed settlement which was reached without authorization from one of the parties. *U.S. v. 32.40 Acres of Land, More or Less, Situated in Leelanau County, State of Michigan,* 614 F.2d 108 (6th Cir. 1980).

Both of these reasons apply to the instant case. The defendant had a number of meritorious defenses which would have absolutely precluded the entry of judgment against him, but Ohio Casualty did not assert any of those defenses. **Moreover, Ohio Casualty and Peoples Bank did not tender Pulliam the defense of the underlying action, nor did they obtain his consent to the settlement. That action was settled "behind his back," without either his knowledge or his consent.** It would certainly be neither equitable nor legal that Pulliam should be required to pay a judgment against which he had no opportunity to defend; and this principle applies with equal force to a compromise settlement reached in lieu of a judgment.

The Petitioner, therefore, is entitled to relief on at least three of the grounds set out in Rule 60 (b).

III. THE "RESTITUTION AGREEMENT" IS AN INDEMNITY CONTRACT.

The instant case seeks to enforce a contract, styled a

"Restitution Agreement," entered into between the Petitioner and Peoples Bank. That document is, in fact, an indemnity contract.

Plaintiffs have conceded that such is the case. In ¶ 8 of the instant Complaint, **they specifically assert that it is an indemnity agreement.** ("Pulliam agrees to indemnify Peoples..."). Furthermore, in Action # 97-846-CIV-T-17A, U.S. District Court, M.D. Fla., Ohio Casualty identified this document as an "indemnification agreement which obligated Pulliam to indemnify" Peoples Bank. Motion to Dismiss, filed 7/16/97, at 2. Ohio Casualty is, therefore, estopped to deny that such is its character. *Hunt's Ex'x v. Mutter,* 238 Ky. 396 (1931)(pleader "cannot be heard to say later that a judgment rested on his own allegations is erroneous").

Moreover, even absent this declaration, it is clear that **Pulliam is an indemnitor** rather than a surety or a guarantor. Contracts of guaranty and suretyship both involve a direct promise to perform the obligation of the principal in the event of a defalcation. A contract of indemnity, on the other hand, obligates the indemnitor to reimburse the indemnitee for loss suffered, but it does not obligate him to perform the obligation indemnified. *A.J.Kellos Const. Co. Inc., v. Balboa Ins. Co.*, 495 F.Supp. 408, 412 (D.Ga. 1980).

A contract of guaranty or suretyship requires three parties, namely the obligee, the obligor and the surety; a contract of indemnity requires only two parties, namely the indemnitor and the indemnitee. *Moore v. Capital Nat. Bank of Lansing,* 264 N.W. 288 (Mich. 1936).

The "restitution agreement" relied on by the plaintiffs involved only two parties, Pulliam on one side and Peoples Bank on the other. That "agreement" was not a direct undertaking between Pulliam and the obligee, i.e. Barnett Bank. Barnett Bank was not involved in drafting the "restitution agreement;" in fact, Barnett Bank was not even aware of its existence. **The "restitution agreement," therefore, is obviously a contract of indemnity**, as the plaintiffs have correctly noted in ¶ 8 of their Complaint and in their Florida pleadings.

Since the "restitution agreement" is an indemnity contract, and the instant action was brought to enforce that "agreement," this action is subject to the rules of law governing actions on indemnity contracts. As shown below, **plaintiff has made no attempt to follow those rules.**

IV. AN INDEMNITEE MUST PLEAD AND PROVE LEGAL LIABILITY.

It is elementary that, **to recover on a contract of indemnity, the indemnitee must have incurred a legal liability to the injured party**. As one federal court has stated the rule:

> (B)efore one can bring any action for indemnity, there must at least be a legal obligation fixed upon the indemnitor to pay.

West Africa Navigation, Ltd. v. Nacirema Operating Co., 191 F.Supp. 131, 133 (E.D. Pa. 1961)

Indemnity will not be granted to a mere "volunteer." *Industrial Risk Insurers v. Creole Production Services, Inc.*, 746 F.2d 526 (9th Cir. 1984).

This requirement poses no difficulty where the indemnitee's claim is founded on a judgment, since actual legal liability has been established. *Robbins v. City of Chicago*, 71 U.S. 657 (1866). The requirement is likewise satisfied when the indemnitor has been notified of the underlying action and offered an opportunity to defend the case, but has refused to do so. *St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.*, 201 U.S. 173 (1906)(per Holmes, J.).

A different state of case arises, however, when the indemnitor has neither been notified of the underlying case, nor offered an opportunity to defend it. If the defendant in such an action compromises the case without first tendering the defense to his indemnitor, the defendant does so at his own risk. In a subsequent action against his indemnitor, the defendant must specifically plead and prove that he would necessarily have incurred legal liability had he not compromised and settled the underlying case.

As the Second Circuit has stated:

> A claim for indemnity, however, requires that **an actual liability** be sustained, and if he settles a claim without a determination of the rights in question, he bears the risk of proving **an actual liability** in the action over for

indemnity.

The TOLEDO, 122 F.2d 255, 257 (2d Cir. 1941).

The Fourth Circuit has likewise stated:

> The indemnitee's unilateral acts, although reasonable and undertaken in good faith, cannot bind the indemnitor; **notice and an opportunity to defend are indispensable due process satisfying elements.**

Jennings v. U.S., 374 F.2d 983, 986 (4th Cir. 1967).

The Sixth Circuit follows the same rule. The attention of the Court is respectfully directed to *Tankrederiet Geifon A/S v. Hyman-Michaels Co.*, 406 F.2d. 1039 (6th Cir. 1969). That case arose out of a fire on board a cargo ship in 1961. The fire caused damage estimated at $700,000. The ship owner, Tankrederiet Geifon, brought suit against the cargo owner, Hyman-Michaels. Hyman-Michaels settled the claim, and then sought to recover the sum paid in settlement from a third party, National Cargo Bureau, through indemnity and contribution.

In the resulting litigation, Hyman-Michaels sought to introduce the settlement agreement as evidence of the fact and amount of its damages. National Cargo objected on the grounds that it had not been given notice and an opportunity to defend the underlying action. The Federal District Court for the Eastern District of Michigan sustained the objection, holding that:

> **the settling defendants, as a condition precedent to their claims for indemnity and contribution, had the burden of proving actual liability to the plaintiffs** rather than potential liability to the plaintiffs.

Tankrederiet Geifon, supra., 406 F.2d. at 1042. (Emphasis added).

An interlocutory appeal was taken from this ruling, and this court sustained the decision of the trial court. This court noted "the general rule that an indemnitee must show actual liability to recover against an indemnitor," and continued:

> We believe the position taken by the District Judge is sound...it certainly seems appropriate for B, the party

> desiring to settle and possessing the facts pertaining to the settlement, to be required to tender C the choice of approving the settlement or of going forward with the defense in exchange for a hold-harmless agreement...If such a tender were refused and B settled, then we think the proofs required in the subsequent suit against C would appropriately be potential liability and reasonableness of the settlement.
>
> **The ultimate problem with any other rule** than that which the District Judge laid down here **is that** potentially **it would allow B (the original defendants) to spend C's (the third-party defendant) money without the final judgment of a court or C's agreement.** Deciding whether to try a case to judgment or to settle it involves elements of legal evaluation, of financial capacity to take risk, and of appetite for court room conflict which vary widely among litigants. We hold that under the facts of this case **B cannot compel C to accept B's evaluation of these critical factors. Any other rule would deny C any opportunity to contest B's liability to A - a liability which C may be required to pay.**

***Tankrederiet Geifon, supra.*, 406 F.2d. at 1043-44. (Emphasis added).**

The Sixth Circuit further noted that "C had full knowledge of the litigation and...knew that settlement negotiations were going on." However, "**B never made a formal tender of the defense.** And there is nothing in this record to show that B ever disclosed the settlement terms to C and asked C, as a potential indemnitor, to approve." Therefore, the court found that no "conduct on the part of C constituted a waiver of its right to a tender of the defense." *Id.*,at 1044.

Kentucky follows the same rule. The former Kentucky Court of Appeals stated flatly:

> **(O)ne who has voluntarily paid a claim should be required to show that he was legally liable for it and could have been compelled to pay the claim before he**

is permitted a recovery by way of indemnity.

Ashland Oil & Refining Co. v. General Telephone Co., 462 S.W.2d 190, 193 (Ky. 1970) citing *Aetna Freight Lines, Inc. v. R.C. Tway Co.*, 352 S.W.2d 372, 374 (Ky. 1961)(**a settlor seeking indemnity must show actual legal liability,** not simply the possibility of having been held liable).

The trial court considered and applied this holding in *Long v. Illinois Central Gulf R. Co. in Paducah, Ky.*, 660 F.Supp. 469 (W.D. Ky. 1986)(*per* Johnstone, C.J.). To the same effect is the holding of *In re: Air Crash at Detroit Airport*, 791 F. Supp. 1204 (E.D. Mich. 1992). In the latter case, an indemnitee had failed to make a seasonable tender of the defense to its indemnitor. The court, citing *Tankrederiet Geifon*, held that the plaintiff/indemnitee **must plead and prove actual legal liability.** Moreover, this defect was not cured by the verdict in its favor, since **"the indemnity claims fail as a matter of law."** *Id.* at 1237; *cf., Fender v. Stiles*, 31 Ill. 460, 463 (1863).

Applying this rule to the case at bar, **neither Peoples Bank nor Ohio Casualty ever made a formal tender of the defense of the underlying action to Pulliam. Moreover, when they settled the case, the People's Bank and Ohio Casualty did not disclose the settlement terms to Pulliam, nor did they procure his assent thereto.** Therefore, under the foregoing rule, **when Peoples Bank and Ohio Casualty settled the underlying case** for two hundred thousand dollars, **they were acting as volunteers.** Consequently, **neither Peoples Bank nor Ohio Casualty has any right to be indemnified** by Pulliam.

Furthermore, **to state a claim for indemnity, an indemnitee who has settled a claim prior to judgment must plead and prove that he either tendered the defense to the indemnitor and was refused, or that the indemnitor approved the settlement terms. The instant complaint does not even allege that such is the case;** and Ohio Casualty certainly made no attempt to prove such fact at trial.

The instant complaint, therefore, fails to state a claim on which relief may be granted. **This is a jurisdictional defect** which may be taken advantage of by a collateral attack under Rule 60(b)(4). *See, Morgan v. O'Neil*, 652 S.W.2d 83 (1983).

V. OHIO CASUALTY FAILED TO ASSERT AVAILABLE DEFENSES.

There is a further reason why the judgment must be set aside: in the underlying action, Ohio Casualty and Peoples Bank failed to assert all of the defenses which were available to them, and otherwise failed to adequately protect Pulliam's interest, as they were required to do.

It is a basic principle of indemnity law that an indemnitee's failure to vigorously defend the underlying action operates to discharge the indemnitor. As Justice Story has noted:

> (I)f a creditor does any act injurious to the surety, or inconsistent with his rights; or if he omits to do any act...which his duty enjoins him to do, and the omission proves injurious to the surety; in all such cases the latter will be discharged, and he may set up such conduct as a defense to any suit brought against him.

1 J. Story, Commentaries on Equity Jurisprudence, etc. (3d ed.) § 325 (1843). This Court has likewise stated:

> If the holder of a negotiable promissory note does anything, the effect of which is to suspend, impair, or destroy the right of the prior parties to indemnity from those otherwise liable over to them, he cannot resort to the parties affected by his conduct to make good the default of the maker of the instrument.

Ross v. Jones, 89 U.S. 576, 587 (1874). Even earlier, this Court had written:

> We admit the doctrine, that although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him.

M'Lemore v. Powell, 12 Wheat. 554, 556-57, 6 L.Ed. 726,727 (1827) (*per* Story, J.)

Kentucky has long followed this rule. As Chief Justice Boyle stated:

> . . . it is a principle recognized by courts of chancery and perfectly consonant to the dictates of natural justice, that any arrangement between the creditor and principal debtor, for the easement of the latter and to the prejudice of the securities, will, if the securities be not privy to or approve of such arrangement, operate in equity to release them from their responsibility.

Jones & Lee v. Bullock, 6 Ky. 467, 469 (1814).[2]

Courts have consistently held that the indemnitee's failure to assert an available defense to the underlying action is such an act as will release the indemnitor from liability. In the first place, this rule is an application of the well recognized principle that an assignor cannot impair the rights of his assignee. Equitable subrogation is an incident of every contract of indemnity, and follows upon the payment of the loss by the indemnitor. *Garrison v. The Memphis Insurance Co.*, 60 U.S. 312, 317 (1857).

Upon payment of the loss by the indemnitor, he becomes equitably subrogated to the rights of the indemnitee, including any rights of action and defenses which the indemnitee might have against his creditor arising out of or incident to the obligation indemnified.

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2. To the same effect are *Craig v. Cox*, 5 Ky. 309, 310 (1811); *Norton and Williams v. Roberts and Latham*, 20 Ky. 491, 493 (1827); *Pope v. Davidson*, 28 Ky. 400, 405-06 (1831); *Davidson v. Pope*, 33 Ky. 270, 272-73 (1835); *Spilman v. Smith*, 54 Ky. 123, 126, 135 (1854); *Bridgeford v. Burbank*, 8 Ky. Opin. 872, 878-79, 3 KLR 98, 106-07, 109 (1874); *Fidelity & Deposit Co. of Maryland v. O'Bryan*, 180 Ky. 277, 287 (1918); *Feland v. Berry*, 130 Ky. 328, 338 (1908) (indemnitor bound by former adjudication because indemnitee "made a reasonably efficient and skillful defense" thereto); *cf.. Lufton Mining Co. v. Louisville & N.R.Co.*, 276 Ky. 321, 328 (1938)(implying that indemnitee's modification of underlying obligation which increased indemnitor's liability would have discharged indemnitor if he had not acquiesced therein).

his creditor arising out of or incident to the obligation indemnified. *Comegys and Petit v. Vasse*, 26 U.S. 193, 215-16 (1828)(per Story, J.) (such legal rights "pass by cession to the ultimate sufferer"). The law will not permit the assignor to impair these legal rights of his assignee. As Justice Story stated the rule:

> Courts of law...take notice of assignments of choses in action, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covenous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment.

Welch v. Manderville, 14 U.S. (1 Wheat.) 233, 236, 4 L.Ed. 79, 80 (1816).

Following remand, the foregoing case was again considered by the Supreme Court. Upon that hearing, Justice Story reaffirmed and explained his former holding as follows:

> It has been long since settled, that where a chose in action is assigned by the owner, he shall not be permitted, fraudulently, to interfere and defeat the rights of the assignee, in the prosecution of any suit to enforce those rights.

Mandeville v. Welch, 18 U.S. (5 Wheat.) 277, 284 (1820); *cf,. Blackerby v. Holton*, 35 Ky. 520, 522 (1837)(where chose in action assigned, courts will protect the rights of the assignee).

Second, numerous courts, including this Court, have specifically held that an indemnitee's failure to assert an available defense discharges the indemnitor. The attention of Court and counsel is respectfully directed to the holding of *Aetna Casualty & S. Co. v. Phoenix Nat. Bank & T. Co.*, 285 U.S. 209, 76 L.Ed. 709 (1932), a case which arose in the Commonwealth of Kentucky.

In its briefs, the insurance company had argued:

> The indemnitor is relieved from the payment of losses which could have been avoided, diminished or recouped elsewhere by the indemnitee. The indemnitee is under legal obligation diligently to assert or to allow and aid the indemnitor to assert, any reasonable defense to the alleged liability.

Aetna Casualty & Surety Co. v. Phoenix Nat'l Bank & Trust Co., supra, Brief of Petitioner at 10.

This Court agreed, writing:

> (The bank) was...under a duty not to impair the rights which (the insurance company), upon payment of its obligation, might enforce against third persons. The failure to observe that duty...released the (insurance company) from...liability.

Aetna Casualty & S. Co., supra, 285 U.S. at 215, 76 L.Ed. at 713.

Commenting on the foregoing case, the Yale Law Journal stated:

> To bind the indemnitor by a judgment holding invalid the indemnitee's defense to a suit on a claim brought against him, the latter must give notice of the pending suit. Further, under penalty of releasing the indemnitor entirely, he is required diligently to assert, or to allow and aid the indemnitor to assert, any reasonable defense to his alleged liability.

Note, 40 Yale L.J. 660, 662 (1931).

To the same effect are the words of the Eighth Circuit:

> (The indemnitee) cannot play fast and loose with sureties...By compelling them to defend the former action, and depriving them of the benefit of a full defense, it deprived itself of the right to pursue these sureties, and

discharged them from liability.

American Surety Co. v. Ballman, 115 F. 292, 294-95 (8th Cir. 1902).

To the same effect are the holdings of *Grand Lines, Inc. v. Central Gulf Steamship Corp.*, 416 F.2d 977 (5th Cir. 1969); *City of Owensboro v. Westinghouse, Church, Kerr & Co.*, 165 F. 385, 390 (6th Cir. 1908)(implying that indemnitee's bad faith failure to present available defense would have discharged indemnitee); *American Export Isbrandtsen Lines, Inc. v. United States*, 390 F.Supp. 63, 69 (S.D.N.Y. 1975); *Martin Co. v. United States*, 163 F.Supp. 376, 378 (Ct.Claims 1958)(indemnitee has no right to surrender substantial defense without consent of indemnitor).

Applying this rule to the case at bar, it is clear that the indemnitees, Ohio Casualty and Peoples Bank, had a number of available defenses which they failed to assert. The defense of improper venue, set out below, was obviously available to the indemnitees. More important, the defense of contributory negligence was available to the indemnitees. In other words, the indemnitees should have asked the trial court to apportion fault among Pulliam, Peoples Bank, James King, and Barnett Bank. Had Pulliam been impleaded as a party, he would have been entitled to assert such a defense.

The indemnitees, however, did not join Pulliam as a party defendant; they did not tender him the defense of the case; they did not challenge the venue of the case; and they did not assert Barnett Bank's contributory negligence as a defense. Ohio Casualty's failure to do so deprived Pulliam of his ability to assert these defenses. Under the foregoing rule, it also released Pulliam from his contract of indemnity.

The court below should, therefore, have set aside its prior judgment as founded on an invalid contract, and should dismiss the action.

VI. THE ASSIGNMENT IS INVALID

The judgment is also invalid because **Ohio Casualty lacked standing to bring the instant action.** It is elementary that, pursuant to Rule 9(a), FRCP, a would-be plaintiff must have standing to bring an action. *Valley Forge Christian College v. Americans United for*

Separation of Church and State, 454 U.S. 464 (1982); *Flast v. Cohen,* 392 U.S. 83 (1968).

Article III of the United States Constitution gives federal courts the right to decide "cases" and "controversies" In order to invoke a federal court's jurisdiction, a plaintiff must have the right to assert a claim. **The would-be plaintiff must, in other words, be the proper party to request adjudication of the particular issue.**

In the case at bar, it is clear that Ohio Casualty had no privity with Pulliam when he executed the "restitution agreement." That undertaking was between Defendant Pulliam and Peoples Bank. Pulliam made no representations or guarantees to Ohio Casualty. Ohio Casualty was not a party to the "restitution agreement"; it did not participate in the negotiations leading up to the agreement; it seems at the time to have had no knowledge of their existence.

Ohio Casualty seeks to avoid the obvious conclusion - that it lacks standing to enforce the "agreement" - by claiming that Peoples Bank assigned to it the Bank's right to indemnity by Pulliam. Unfortunately for the Plaintiffs' argument, **the indemnity contract was not properly assignable to Ohio Casualty.**

Moreover, **this jurisdictional defect was apparent on the face of the Complaint.** This fact rendered the supposed contract void, and the judgment entered thereon a nullity.

It is well recognized that **contingencies and possibilities are not assignable.** As the treatise Corpus Juris similarly states:

> **The rule at common law does not permit the assignment or transfer of property not in existence and not in the actual or potential possession of the assignor at the time of the assignment, or the assignment of a mere possibility** not founded on a right or coupled with an interest.

5 C.J. Assignments §116 (1916); 6A C.J.S. Assignments §16 (1975)(**"The rule at common law does not permit the assignment of a mere possibility."**); 6 Am.Jur.2d. Assignments §8 (1963); 4 Am.Jur. Assignments §4 (1936)("in order for a right or interest to be assignable, it must have, at the time of the purported assignment, either an actual or potential existence").

The common law rule prevails in this Commonwealth. **Kentucky's highest court has repeatedly upheld the common law rule.** The attention of court and counsel is directed to the holding of *McCall's Adm'r v. Hampton*, 98 Ky. 166 (1895), in which the court wrote:

> The question in this case is whether a naked possibility or contingency, not founded upon a right coupled with a interest, can be assigned or sold. Under the common law this could not be done. **There is no statute changing the common law on this subject.**

McCall's Adm'r v. Hampton, supra, 32 S.W. at 407.

The court noted that when the contract in question was made:

> **The subject-matter of the contract was not in esse at the time of the contract. A contract of bargain and sale is invalid unless there is a thing or subject-matter to be contracted for. This is absolutely essential to the validity of the contract.**

The court cited Lord Coke to this effect, and then continued:

> **. . . is essential to the legal validity of a contract that the thing sold must have an actual or potential existence,** and that **a mere possibility or contingency,** not founded on a right or coupled with an interest, **cannot be the subject of** sale or **assignment**...Every text writer and every court in this country, so far as we are aware, recognize the rule of the common law to be as we have stated it.

The court distinguished a number of cases and authorities which the appellee had cited, and then concluded:

> It is axiomatic that **in every valid grant there must be a grantor, grantee, and a thing to be granted. When there is no subject-matter, nothing in esse, about which**

> **a contract can be made, the essential thing to the validity of a contract is absent; hence such contract is declared by law to be void. If it be void, then no party to it can maintain an action upon it.** A wise public policy produced the law which fixed the status of parties to such a contract...It seems, at this late day, it is needless to discuss the wisdom and policy of a law which has been sanctioned for so many generations, and we do not feel that we are called upon to defend it. A strict adherence to it will save multiplying contentions, and will protect the improvident...from fraud and deceit.

McCall's Adm'r, supra, 32 S.W. at 408.

The court, therefore, remanded the case and directed the trial court to dismiss the action.

It is clear that the "thing" assigned to Ohio Casualty by Peoples Bank was merely a possibility or a contingency. The assignment contract between Peoples Bank and Ohio Casualty was executed on either September 27, 1989 or September 28, 1989 (Plaintiff has attached two contracts to its complaint, which are not of even date).

That contract attempted to assign to Ohio Casualty the Bank's cause of action against Pulliam. That cause of action did not arise, however, until the underlying case was settled. **At the time of the purported assignment, therefore, Peoples Bank's cause of action against Pulliam had not yet come into existence; it remained a mere possibility,** contingent upon the outcome of the underlying case.

Stated another way, Pulliam had (supposedly) agreed to indemnify Peoples Bank in the event it were held liable to Barnett Bank. **Until the happening of that event, Pulliam's obligation to indemnify Peoples Bank remained a mere possibility.** In the words of the aforecited cases, there was no "thing in esse" which could be assigned. Under the common law rule, therefore, this assignment of a **mere possibility** was invalid, and the purported contract was absolutely void, and a nullity.

Further, **this defect is jurisdictional in nature** and renders the action founded upon the void contract a nullity. The court should clearly understand that in Kentucky **an action founded on an invalid**

contract is not merely voidable, but absolutely void. F. Murray, "American Law Institute's Restatement of the Law of Contracts Annotated with Kentucky Decisions: Assignment of Contracts," 23 Ky.L.J. 490, 491 (1935)(emphasis added). The former Court of Appeals, in *Hunt v. Smith, supra,* said of actions to enforce such contracts:

> The contracts being void as against public policy, **no obligation was imposed by them,** either in law or equity, **that can be enforced.** It has time and again been decided in this jurisdiction that **no right of action can be based on a contract that is contrary to public policy and void.**

Hunt v. Smith, supra, 17 A.L.R. at 595.

The court also noted that contracts attempting to assign a mere possibility are

> **but bargains of chance, closely akin to,** if not to be actually classed with, **gambling transactions,** and...of a character denounced by law as **against public policy,** which made them void and in consequence **unenforceable for any purpose.**

In support of its holding the court cited its prior decisions *Chesapeake and O.R. Co. v. Maysville Brick Co.*, 132 Ky. 643, 650, 116 S.W. 1183 (1909)("no right of action can be predicated on a contract that is contrary to public policy and void") citing *Hancock v. Railroad Co.*, 145 U.S. 416, 12 S.Ct. 969, 36 L.Ed. 755 (1892)("a contract made in violation of a statute is void and when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover"); *Murphy v. Simpson*, 53 Ky. 419, 421 (1854); *Vanmeter v. Spurrier*, 94 Ky. (1893); *Calor Oil and Gas Co. v. Franzell*, 128 Ky. 715 (1908); *Todd v. Caplinger*, 67 Ky. 139, 144 (1868)("when a party enters into a contract forbidden by law, he cannot recover upon the contract"); *Chapman v. Haley*, 117 Ky. 1004 (1904); *Patterson v. Hamilton*, 42 S.W. 88 (1898); and *Levy v. Doerhoefer*, 188 Ky. 413 (1920).

Moreover, the illegality of a contract cannot be waived by failing to assert it prior to judgment. As the former Court of Appeals

explained:

> If **at any time** it appears in the progress of the action that the contract sued upon is one which the law forbids, the court will refuse relief.

Terry v. Rose, 251 Ky. 314, 64 S.W.2d. 909 (1934).

This is because **a contract made in contravention of public policy is absolutely void.** As the court noted in *Haldeman v. Haldeman*, 176 Ky. 635, 197 S.W. 376 (1917):

> If the contract runs counter to the statute, it is vain to argue that the contract should prevail over the statute...
>
> ...The vital question, therefore, which confronts us at the threshold of the case is: Shall the law prevail, or the contract made by the parties in direct violation of the law? There can be but one answer to this question; the law must prevail.

Haldeman, supra, 197 S.W. at 380.

It is true, of course, that this defect was neither called to the court's attention, nor was it noted by the court, prior to the rendition of judgment. However, since the invalidity of the contract renders the resulting judgment absolutely void, and not merely voidable, **it is a jurisdictional defect which may be raised at any time** under Rule 60 (b) (4).

The only Kentucky case in which a judgment founded on an illegal contract has been subsequently vacated upon a collateral attack appears to be *Clay v. Fry*, 6 Ky. 248 (1813) (judgment founded on illegal gambling contract set aside when attacked collaterally).

The Oklahoma Supreme Court, however, set aside a judgment founded on such an illegal contract when it was attacked collaterally. *Deal v. Kirkpatrick*, 31 P.2d. 591 (1933)(judgment based on illegal contract "is void and cannot be enforced").

The Colorado Supreme Court has similarly held. That court wrote:

> (W)here the act prohibited is an expression of the public

> policy of the state, as against good morals and public interests, **a contract in violation of the statute is wholly void and may not be enforced,** and a decree purporting to enforce it does not impart any validity to it, and the same **may be taken advantage of in a collateral attack.**

People ex rel. Ark. Valley Sugar Beet and Irr. Land Co. v. Burke, 212 P.837 (1923).

A similar rule must prevail in the case at bar. The contract of assignment sought to be enforced is contrary to the public policy of this Commonwealth. It is, therefore, a nullity, and must be set aside by the court.

CONCLUSION

In the court below, Pulliam asserted nine grounds for granting his Appeal. Ohio Casualty did not even attempt to answer most of those points. Moreover, the "arguments" which it asserted were not properly supported by citations to pertinent legal authority. Instead, Ohio Casualty chose to rest its arguments upon the unsupported and conclusory assertions of its counsel. Such "argument" was absolutely inadequate to meet its burden of persuasion.

Most importantly, Pulliam has never had his day in Jefferson Circuit Court. For more than eleven years, Ohio Casualty, its counsel, James O. King, Jr., and Barnett Bank have subjected Pulliam and his family to interminable mental anguish, civil litigation, attachments and garnishments. It is high time - indeed, it is well past time - that Pulliam be given the opportunity to prove the collusion, fraud and criminal conspiracy of Ohio Casualty, of James O. King and of the Barnett Bank.

The Court, therefore, should grant Pulliam's Petition, and upon hearing, should remand the case to the trial court with directions that the action be dismissed with prejudice. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,

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APPENDIX

APPENDIX A

RULE 60, F.R.C.P.
RELIEF FROM ORDER OR JUDGMENT

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); fraus (whether heretofore denominated intrinsic or extrinsic)), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules of by an independent action.

APPENDIX B

No. 96-6522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Ohio Casualty Insurance Co. Plaintiff-Appellee,	)	ON APPEAL FROM
	)	THE UNITED STATES
v.	)	DISTRICT COURT FOR
	)	THE WESTERN
WARREN PULLIAM Defendant-Appellant.	)	DISTRICT OF KENTUCKY

Before: KEITH, CONTIE, and SUHRHEINRICH, Circuit Judges

PER CURIAM. Ohio Casualty Insurance Company ("Ohio Casualty") paid more than $200,000 to Barnett Bank of Tampa ("Barnett Bank") under a surety bond covering Warren Pulliam ("Pulliam") and Peoples State Bank of Chaplin, Kentucky ("Peoples State Bank"). Ohio Casualty subsequently filed an action against Pulliam seeking indemnity and contribution. A jury returned a verdict for Ohio Casualty in the amount of $200,000. Pulliam moved for a new trial, to alter or amend the judgment, or for judgment notwithstanding the verdict. The district court denied Pulliam's motions. Pulliam did not appeal.

Pulliam moved to set aside the judgment more than three years later pursuant to Federal Rule of Civil Procedure 60(b). The district court denied Pulliam's Rule 60(b) motion as untimely. On appeal, Pulliam challenges the denial of his Rule 60(b) motion. We affirm the district court's decision for the following reasons.

I.

Pulliam was a principal owner and President of Peoples State bank. On December 17, 1986, Pulliam agreed to indemnify Peoples State Bank for losses arising from his wrongful issuance of certified checks. Peoples State Bank assigned its rights under this restitution agreement to Ohio Casualty.

On February 1, 1988, Barnett Bank sued Peoples State Bank to recover funds wrongfully paid to Peoples State Bank. Ohio Casualty, acting on behalf of Peoples State Bank, paid Barnett Bank approximately $200,000 to settle the action. Because Pulliam's mismanagement of bank funds caused the loss, Ohio Casualty filed

this action in district court on May 25, 1990, seeking indemnity and contribution from Pulliam under the terms of the restitution agreement.

On July 8, 1992, the jury returned a verdict for Ohio Casualty in the amount of $200,000. On July 20, 1992, Pulliam filed a motion for a new trial, to alter or amend the judgment, or for judgment notwithstanding the verdict. On October 21, 1992, the district court denied Pulliam's motions. Pulliam did not appeal the district court's October 1992 decision. Instead, Pulliam filed a motion - pursuant to Federal Rule of Civil Procedure 60(b) - to set aside the jury's 1992 verdict on October 17, 1995. The district court denied Pulliam's untimely motion.

> Before any consideration may be given to other issues raised, Pulliam must successfully leap the procedural hurdle of the one year limitation set out in Fed. R. Civ. P. 60(b). Application of this rule to the present motion disposes of Pulliam's claims based on Section three (3) of Rule 60(b). Pulliam's assertions that the settlement between Barnett Bank and Peoples resulted from fraud and collusion and his claims that he failed to receive notice prior to this settlement both fall within Section (3) of Rule 60(b). Accordingly, the one year limitation bars their consideration.
>
> The court need only consider the remaining claims of Pulliam under Sections (4) and (6) of Rule 60(b). Pulliam claims the judgment is void pursuant to Rule 60(b)(4) arguing that the assignment of the indemnity contract by Peoples to Ohio Casualty is invalid and that the judgment is void for improper venue . . . Additionally, he asserts that an assignment is valid only where the subject matter is in existence at the time of the assignment.
>
> In short, Pulliam claims that until Peoples was held liable to Barnett Bank, he had not obligation to indemnify Peoples. This claim is untenable because at the time of the assignment, the assignor, Peoples, had a present contractual right to future reimbursement via the settlement agreement obligation Pulliam to indemnify Peoples for losses from claims of third parties. On February 25, 1998, Warren

> Pulliam himself signed and executed this agreement. Thus, Peoples' rights of indemnification existed at the time of their assignment to Ohio Casualty on September 27, 1989.
>
> . . . The fact that Pulliam may be prejudiced by the actions of Peoples in settling simply provides one more reason that Pulliam should have moved to intervene. His failure to do so combined with his failure to raise this issue in a timely fashion constitutes a waiver of the venue issue. The judgment is not void under Rule 60(b)4.
>
> Pulliam also seeks relief under Section (6) of Rule 60(b), which provides a remedy for "any other reason justifying relief from the operation of the judgment." Specifically, Pulliam asserts that the failure of his counsel to assert available defenses and the settlement of the underlying action allegedly without his knowledge constitute the requisite extraordinary circumstances justifying relief. The court finds that they do not. Further, the court finds the three year delay in bringing this motion to be unreasonable.

District Court's October 2, 1996 Memorandum Opinion and Order at 2-4.

Pulliam filed his notice of appeal on November 6, 1996.[1]

II.

On October 2, 1996, the district court denied Pulliam's Rule 60(b) motion to set aside the jury's July 8, 1992 verdict. On appeal, Pulliam challenges the district court's October 2, 1996 decision denying his Rule 60(b) motion.

On July 8, 1992, the district court ordered Pulliam to pay Ohio Casualty $200,000. On July 20, 1992, Pulliam moved for a new trial, to alter or amend the judgment, or for judgment notwithstanding the verdict. The district court denied Pulliam's motion on October 21,

---

1. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), a notice of appeal must be filed within thirty days following the entry of the judgment or order. Because the district court's October 2, 1996 Memorandum Opinion and Order was entered on October 7, 1996, Pulliam's November 6, 1996 Notice of Appeal was timely.

1992. Pulliam did not appeal the denial of his motions.

On October 17, 1995, Pulliam filed a Rule 60(b) motion seeking to set aside the jury's 1992 decision. In his motion, Pulliam asserted that he had no obligation to reimburse Ohio Casualty because Peoples State bank should not have settled with Barnett Bank; Ohio Casualty's claim was a product of collusion; his agreement to indemnify Peoples State Bank for its losses lacked consideration, and he was not personally liable for the losses suffered by Peoples State Bank. On October 2, 1996, the district court rejected Pulliam's Rule 60(b) motion as untimely.

On appeal, Pulliam argues the substantive merits of his claim. In response, Ohio Casualty asserts that we need not address the merits of Pulliam's claim because Pulliam failed to justify the untimeliness of his Rule 60(b) motion. We agree.

Federal Rule of Civil Procedure 60(b) provides (in relevant part):

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); fraud . . . misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated . . .; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b). Accordingly, Rule 60(b)(1) through 60(b)(3) motions must be made during the one-year period noted above, and Rule 60(b)(4) through 60(b)(6) motions must be made "within a reasonable time." As a practical matter, a party seeking relief from judgment under Rule 60(b) must show the applicability of the rule. In re Salem Mortgage Co., 791 F.2d 456, 459 (6th Cir. 1986).

Pulliam's Rule 60(b) motion included allegations that fell under subsections (b)(3), (b)(4) and (b)(6). Because motions filed

under Rule 60(b)(3) must be filed within one year of the district court's underlying judgment, and because Pulliam filed his motion more than three years after the jury's verdict, the district court properly held that Pulliam is precluded from pursuing his motion for relief under Rule 60(b)(3).

Pulliam's remaining claims fell under 60(b)(4) and 60(b)(6). As noted above, claims under these subsections must be filed "within a reasonable time." this court has previously noted that the bounds of reasonable time "ordinarily depends on the facts of a given case including the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling equitable relief." Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir. 1990). Under this standard, we believe that Pulliam's 60(b)(4) and 60(b)(6) claims are untimely.

Though district courts enjoy broad discretion when deciding whether to set aside judgments under Rule 60(b), that discretion "is circumscribed by public policy favoring finality of judgments and termination of litigation." Waifersong, Ltd. v. Classic Music Vending, 976 F.2d 290, 292 (6th Cir. 1992). The public policy favoring finality of judgments necessitates the requirement that all 60(b) motions be made "within a reasonable time." In fact, a district court may not extend the time limits imposed by Rule 60(b). *See* Smith v. Secretary of Health & Human Servs., 776 F.2d 1330, 1332-33 (6th Cir. 1985)(district courts do not have discretion to extend the time limits governing Rule 60(b) motions).

Pulliam filed his 60(b) motion more that three years after the jury ordered him to pay Ohio Casualty $200,000.[2] Pulliam failed to explain the lengthy delay, and he failed to produce evidence to support his extraordinary motion. In fact, Pulliam conceded that he could not prove the fraud that he alleged.

Because a Rule 60(b) motion "cannot be used to avoid the consequences of a party's decision to settle the litigation or to forego an appeal from an adverse ruling," Steinhoff v. Harris, 698 F.2d 270, 275 (6th Cir. 1983)(citation omitted), and because Pulliam waited more than three years to challenge the jury's verdict, the district court did not abuse its discretion when it denied Pulliam's Rule 60(b) motion as untimely.

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2. It appears that Pulliam did not file his Rule 60(b) motion until Ohio Casualty's collection efforts threatened his assets.

We therefore **AFFIRM** the district court's October 2, 1996 memorandum Opinion and Order.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

OHIO CASUALTY INSURANCE CO
PLAINTIFF,

v. **CIVIL ACTION NO. 3:90CV-0367-(J)**

WARREN PULLIAM
DEFENDANT.

MEMORANDUM OPINION AND ORDER

Warren Pulliam has moved the court to set aside judgment entered in favor of Ohio Casualty Insurance Co. against him of July 8, 1992. A chronological recitation of the underlying events may be helpful to an understanding of the analysis used by the court in overruling the motion.

Pulliam was a principal owner and President of the Peoples State Bank in Chaplin, Kentucky.

On December 17, 1986 Pulliam entered into a restitution agreement to indemnify Peoples for losses it might sustain from Pulliam's wrongful issuance of certified checks. Peoples assigned its rights under this agreement to Ohio Casualty.

On February 1, 1988, Barnett Bank of Tampa sued Peoples in the Jefferson Circuit Court seeking funds wrongly paid to Peoples. To settle this action, Ohio Casualty paid Two Hundred Thousand dollars($200,00) to Barnett Bank on behalf of Peoples.

On February 25, 1988 Pulliam and Peoples executed a settlement agreement obligating Pulliam to indemnify Peoples for losses resulting from claims of third parties.

On September 27, 1989 Peoples assigned its right to indemnification to Ohio Casualty.

On May 25, 1990 Ohio Casualty brought suit against Pulliam to enforce the indemnification rights assigned to Peoples.

In July 1992, the court entered judgment in favor of Ohio Casualty pursuant to a jury verdict of Two Hundred Thousand dollars ($200,000).

On October 17, 1995, more than three years later, Pulliam filed this motion pursuant to Federal Rule of Civil Procedure 60(b).

Fed. R. Civ. P. 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. (emphasis added).

Before any consideration may be given to other issues raised, Pulliam must successfully leap the procedural hurdle of the one year limitation set out in Fed. R. Civ. P. 60(b). Application of this rule to the present motion disposes of Pulliam's claims based on Section three (3) of Rule 60(b). Pulliam's assertions that the settlement between Barnett Bank and Peoples resulted from fraud and collusion and his claims that he failed to receive notice prior to this settlement both fall within Section (3) of Rule 60(b). Accordingly, the one year limitation bars their consideration.

The court need only consider the remaining claims of Pulliam under Sections (4) and (6) of Rule 60(b). Pulliam claims the judgment is void pursuant to Rule 60(b)(4) arguing that the assignment of the indemnity contract by Peoples to Ohio Casualty is invalid and that the judgment is void for improper venue. In his claim of nonassignability, Pulliam cites *McCall's Adm'r v. Hampton*, 98 Ky. 166, 32 S.W. 406, 56 Am.St.Rep. 335 (1895) for the proposition that a mere possibility or contingency may not be assigned. Additionally, he asserts that an assignment is valid only where the subject matter is in existence at the time of the assignment. *Snyder v. Snyder*, 235 S.W. 743, 745 (Ky. 1921); *McPhail v. John Hancock Mut. Life Ins. Co.*, 108 F. Supp. 902, 906 W. D. Ky. 1952).

In short, Pulliam claims that until Peoples was held liable to Barnett Bank, he had not obligation to indemnify Peoples. This claim is untenable because at the time of the assignment, the assignor, Peoples, had a present contractual right to future reimbursement via the settlement agreement obligation Pulliam to indemnify Peoples for losses from claims of third parties. On February 25, 1998, Warren Pulliam himself signed and executed this agreement. Thus, Peoples'

rights of indemnification existed at the time of their assignment to Ohio Casualty on September 27, 1989.

Pulliam next claims that the judgment is void for lack of venue. He makes no claim that the present action and resulting judgment was improperly venued. Rather, he claims that the action of Barnett Bank of Tampa, N.A. v. Peoples State Bank of Chaplin, Kentucky, was improperly venued. Pulliam neither intervened in the underlying *Barnett* action to raise this defense, nor did he raise it in the ensuing action brought against him by Ohio Casualty. This court adheres to the holding in *Commonwealth v. Hampton*, 814 S.W.2d 584, 587 (Ky. 1991) in which the Kentucky Supreme Court stated that, "[V]enue, unlike subject matter jurisdiction, may be waived by the parties to a civil of criminal action by agreement or otherwise." The parties to the *Barnett* action waived the defense when they settled the case. The fact that Pulliam may be prejudiced by the actions of Peoples in settling simply provides one more reason that Pulliam should have moved to intervene. His failure to do so combined with his failure to raise this issue in a timely fashion constitutes a waiver of the venue issue. The judgment is not void under Rule 60(b)4.

Pulliam also seeks relief under Section (6) of Rule 60(b), which provides a remedy for "any other reason justifying relief from the operation of the judgment." Specifically, Pulliam asserts that the failure of his counsel to assert available defenses and the settlement of the underlying action allegedly without his knowledge constitute the requisite extraordinary circumstances justifying relief. The court finds that they do not. Further, the court finds the three year delay in bringing this motion to be unreasonable. In *Gonzalez v. Walgreens Company*, 918 F.2d 303 (1st Cir. 1990), the court held that Rule 60(b)6 applies only to grounds for relief not covered by the first subdivisions of the rule, and that such motions should only be granted in extraordinary circumstances. *See also Corex Corporation v. United States*, 638 F.2d 119 (9th Cir. 1981). *United States v. Richlyn Laboratories Inc.*, 365 F. Supp. 805 (E.D. Pa. 1973)(Rule 60(b)6 may not be used as a catch all to avoid one year limitation). In *Mach v. Pennsylvania Railroad Company*, 198 F. Supp. 473 (W.D. Pa. 1961), the court held that it would be unreasonable to grant a Rule 60(b)6 motion brought three years after judgment.

Finally, Pulliam alleges "fraud on the court," which is not subject to the one year limitation in Rule 60(b). Quoting from an earlier decision, the court in *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1338 (5th Cir. 1978) set forth the standard for establishing

fraud upon the court:

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court . . . [I]n order to set aside a judgment or order because of fraud upon the court under Rule 60(b) . . . it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.

That court noted that Rule 60(b) "continues to reflect a strong policy favoring an end to litigation by severely restricting the relief available after the one year limitation has run." *Id.* at 1338. Under this standard there was no fraud upon this court.

IT IS ORDERED:

(1) Pulliam's **motion to set aside the judgment is DENIED.**

(2) This is a final and appealable order. There is no just cause for delay

Dated: 10-2-96

/s/
Edward H. Johnstone, Senior Judge
United States District Court